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in the
Supreme Court
of the
United States

October Term, 1970

No. 945

ROBERT J. MILITANA,

Petitioner,

vs.

UNIVERSITY OF MIAMI,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

PRELIMINARY STATEMENT

This brief is filed in response to the original Petition (hereinafter the "Petition") filed herein seeking a Writ of Certiorari to the District Court of Appeal, Third District, State of Florida. The Petitioner, Robert J. Militana, has also filed a Supplemental Petition for Writ of Certiorari (hereinafter the "Supplemental Petition") which will be responded to separately.

For convenience, the Petitioner, Robert J. Militana, will sometimes be referred to herein as "Militana," and the Respondent, University of Miami, will be referred to as "University."

The following symbols will be used:

(A.) for Appendix to Petitioner's Supplemental Petition

(R.) for Record on Appeal in the Florida Third District Court of Appeal

(P.) for Petition for Writ of Certiorari

(Pl. Ex.) for Plaintiff's Exhibit

(Def. Ex.) for Defendant's Exhibit

(R. I.) for Record on Appeal of prior mandamus action between the parties hereto

While Respondent will sometimes refer herein to the Appendix to Petitioner's Supplemental Petition, it is Respondent's position that the Supplemental Petition and Appendix thereto were not timely filed and should not be considered by the Court.[1] References to the Appendix to the Supplemental Petition are for convenience only, and Petitioner's original Petition and the Appendix attached thereto must stand or fall on their own merit.

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[1]This position will be argued separately in a Reply to Petitioner's Motion for Leave to File Supplemental Petition.

JURISDICTION

Respondent contends that jurisdiction does not exist to grant the Writ of Certiorari prayed for herein. However, since Petitioner failed to set forth the statutory basis upon which he seeks to invoke this Court's jurisdiction, in order to aid this Court in determining whether it has jurisdiction Respondent states that since the Writ of Certiorari sought herein would be directed to a state court the only possible basis of such jurisdiction is 28 *U.S.C.* §1257(3).

CONSTITUTIONAL PROVISION RELIED UPON

Petitioner failed to set out verbatim the constitutional provision involved in the case, as is required by Rule 40(c) of the Rules of this Court (hereinafter "Rule"). However, his argument is clearly based upon an alleged violation of his rights under Section One of the Fourteenth Amendment to the Constitution of the United States (hereinafter the "Fourteenth Amendment").

The Fourteenth Amendment, Section One, provides in pertinent part that,

> "No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

The Question Presented, properly expressed in the terms and circumstances of the case, is as follows:

WHETHER A PRIVATE EDUCATIONAL INSTITUTION IS REQUIRED TO AFFORD A MEDICAL STUDENT AN ADMINISTRATIVE HEARING PRIOR TO HIS DISMISSAL FOR SCHOLASTIC FAILURE, WHEN THE STUDENT HAS NOT REQUESTED THAT HE BE GIVEN SUCH A HEARING.

STATEMENT OF THE CASE

The University of Miami, a Florida corporation not for profit, is a private educational institution of higher learning consisting of undergraduate colleges and professional schools. The University's School of Medicine was founded in 1952 and since that time has developed into a fully-accredited and established school. The School of Medicine is fully accredited by the American Medical Association and it has full membership in the Association of American Medical Colleges. (R. I. Ex. 8)

The Petitioner, Robert J. Militana, applied for admission to the University's School of Medicine in the Fall of 1958 and was accepted for the school year commencing in September, 1959. (R. I. Ex. D).

An accurate statement of the history of the attendance of Militana at the University's School of Medicine during the period 1959 through the Summer of 1963, at

which time he was first dismissed by the Executive Committee of the School of Medicine for academic failure, is set forth in the opinion of the Florida Third District Court of Appeal in Case No. 65-641, entitled *University of Miami v. Robert J. Militana*, reported at 184 So.2d 701 (Fla. 3d Dist. 1966) as follows:

> Militana was admitted to the University's School of Medicine in the Fall of 1959. At the end of his first academic year the Promotions Committee recommended that he be promoted to the second year on probation. After the second year the Promotions Committee recommended that he be given the opportunity of repeating the second year. Militana repeated the second year and was promoted to the third year. At the conclusion of his third year Militana had a cumulative grade point average of 1.92 — a grade point average of 4.00 is equivalent to an "A." The Promotions Committee recommended that he be promoted to the fourth year on probation, subject to additional satisfactory work and re-examination in Obstetrics-Gynecology and Pediatrics. During the Summer of 1963 Militana successfully completed the required work in Pediatrics. He did not successfully complete the work in Obstetrics-Gynecology. At the conclusion of his work in the Summer of 1963, the Executive Committee of the School of Medicine dismissed him for academic failure. (at 702, 703)

In April, 1964, the Dean of the University's School of Medicine appointed a special review committee to consider Militana's readmission to the School of Med-

icine. Militana suggested that a particular faculty member be appointed to this committee, and this suggestion was followed by the Dean. (R. 1061) Thereafter, the special review committee met and afforded Militana an opportunity to be heard during which Militana orally presented his appeal and submitted a twenty-nine page memorandum in support of his position. (Def. Ex. BB) After the hearing, the committee attempted to verify Militana's statements and in doing so determined that they could not be verified. (R. 784, 1062) The decision of the special review committee was to not readmit Militana to the University's School of Medicine. (R. 1062)

Subsequently, in July, 1964, Militana instituted an action in the Circuit Court in and for Dade County, Florida, seeking to be reinstated, promoted and enrolled for the next school year. (R. I. 14, 15) The cause was tried without a jury. At the close of all the evidence, the Circuit Court took the matter under advisement, and thereafter entered its Final Order Awarding a Peremptory Writ of Mandamus (R. I. 875-882) pursuant to which a Peremptory Writ of Mandamus was issued directed to the University requiring it to forthwith readmit Militana to the School of Medicine, to promote him to the fourth year class and to enroll him in the ensuing school year. Consequently, Militana was readmitted to the School of Medicine for the fourth year of study commencing in September, 1965. (R. 568)

The University appealed the decision of the Circuit Court to the Florida Third District Court of Appeal and on March 31, 1966, the District Court of Appeal, after concluding that under the private contract between Militana and the University upon which the action was based

promotion from one class to another was clearly within the discretion of the Faculty Promotion Committee, reversed the Order of the Trial Court that had directed the University to promote Militana to the fourth year class of the School of Medicine and enroll him during the ensuing year. (Def. Ex. K) On April 21, 1966, the Mandate of the District Court of Appeal was filed with the Lower Court. (Def. Ex. M)

On April 28, 1966, the Executive Committee of the School of Medicine met to consider the case of Militana and to decide the question of whether Militana should be dismissed from student status since the Peremptory Writ of Mandamus had been vacated. (R. 887; Def. Ex. N) At that meeting a motion passed unanimously that the Executive Committee of the faculty reaffirm its previous action of August 28, 1963, that Militana be dropped for academic failure. (Def. Ex. N)

On May 3, 1966, before the decision of the Executive Committee could be acted upon, Militana filed in the Supreme Court of Florida his Petition for Writ of Certiorari to the District Court of Appeal, which action had the effect of preserving the force of the Circuit Court's Order by which Militana was attending classes as a fourth year student. (Def. Ex. O) Thus, pursuant to the still controlling Circuit Court Order, Militana continued to attend the School of Medicine through the remainder of the academic year 1965-66, which ended on June 9, 1966. (Def. Ex. Q)

During his fourth year of Medical School, Militana had a quality point average of 1.79 and in academic standing was ranked 67 in a class of 67. (R. 885)

On June 9, 1966, the Executive Committee of the faculty of the University's School of Medicine held a duly-authorized meeting for the purpose of passing upon the graduation of all members of the senior class. (Def. Ex. R) At this time, proceedings involving the Petition for Writ of Certiorari were still pending in the Florida Supreme Court and the University was still subject to the Order of the Lower Court which had required it to promote and enroll Militana as a senior year medical student, all of which precluded the Committee's consideration of Militana's academic failure after the third year.

At this meeting, Militana's academic performance only as a senior medical student was discussed and reviewed. The record revealed that Militana had received a failing grade in Senior Year Medicine, a course of study which, as the applicable bulletin provided, was required for his graduation. Upon being advised that Militana had received a failing grade in Senior Year Medicine, the Executive Committee voted unanimously that he be dismissed for academic failure. (Def. Ex. R)

On September 20, 1966, the Supreme Court of Florida entered its Order denying the Petition of Militana for a Writ of Certiorari to the District Court of Appeal (Def. Ex. S) and, accordingly, on November 4, 1966, the Circuit Court entered its Final Judgment on the Mandate of the District Court of Appeal (Def. Ex. T) and vacated the Circuit Court Order pursuant to which Militana had attended the University's School of Medicine as a fourth year student, and adopted the Opinion and Mandate of the Third District Court of Appeal as the Order of the Circuit Court.

On December 13, 1966, the Executive Committee was informed that Militana had requested readmission to the

School of Medicine. (Def. Ex. V) In light of the decision of the District Court of Appeal and the Lower Court's Final Judgment on the Mandate which then allowed consideration of Militana's first academic dismissal after the third year of Medical School, the Executive Committee, upon motion and vote taken, declined to consider Militana for readmission to the School of Medicine.

Thereafter, Militana filed a second Complaint against the University in the Dade County Circuit Court alleging that he had successfully completed the courses and work prescribed for a medical student and therefore was entitled to be graduated by the University as a Doctor of Medicine, and that the University had arbitrarily, capriciously and in bad faith refused to issue him a degree therefor. By amended Complaint Militana prayed for a mandatory injunction compelling the University to issue him a degree of Doctor of Medicine. (A. 1-3)

The University defended on the grounds that it had dismissed Militana from the Medical School at the end of his third year of enrollment for academic failure and had taken like action for academic deficiency following his fourth year in the Medical School, which he undertook contrary to the desire of the University during the time when the District Court of Appeal's reversal of the Mandamus Order was stayed pending Militana's Petition for Writ of Certiorari filed in the Supreme Court of Florida. (R. 7-23) On final hearing the Circuit Court found for the University and dismissed the cause. (R. 1269-1273)

Militana appealed the decision of the Circuit Court to the Florida Third District Court of Appeal. In an opinion

filed June 2, 1970, the District Court of Appeal adopted *in toto* the final judgment of the Circuit Court. (A. 124a-130a)

The opinion of the District Court of Appeal, affirming the position of the University, stated in part that "The Plaintiff has failed to produce any evidence that the school acted in bad faith in its action in dropping him." (A. 127a)

The District Court of Appeal also clearly held that its decision in the first case prosecuted by Militana did not prevent the Trial Court's consideration and determination of the question of the failure, *vel non*, of Militana of his third year studies. (A. 128a, 129a)

It is from the decision of the Florida District Court of Appeal, Third District, in this second action, reported at 236 So.2d 162 (Fla. 3d Dist. 1970) that Militana is petitioning this Court for relief.

SUMMARY OF ARGUMENT

In his Petition Militana asks this Court to grant Certiorari to determine whether he was entitled to an administrative hearing prior to the University's refusal to grant him a medical degree. Respondent respectfully submits that this Court does not have jurisdiction to grant Certiorari in this case for the following reasons:

1. A Writ of Certiorari directed to the Florida Third District Court of Appeal would be improper because that Court is not the highest state court in which a decision could have been had.

2. Militana did not properly raise in the Trial Court, or on appeal, the question of his right to a hearing.

3. Militana's Petition does not raise a "federal question" since there is no evidence in the Record that the University's dismissal of Militana constituted "state action."

4. The final judgment sought to be reviewed rests on independent and adequate state grounds.

Respondent further submits that even if this Court finds that it has jurisdiction to consider the matters raised herein, the Court should decline to exercise this jurisdiction. The rule, uniformly established by lower courts, that a hearing is not required for dismissal from an academic institution for scholastic failure recognizes the tremendous burden which would be placed upon this country's educational institutions if they were required to provide hearings for every student dismissed for scholastic failure. The courts should not intervene in the scholastic affairs of educational institutions unless there is a showing that the institution acted arbitrarily, capriciously, or in bad faith. There is no such showing in the instant case.

This Court should also deny the Petition because Petitioner's failure to append a certified copy of the complete record in the appellate court below makes it impossible for this Court to determine if it has jurisdiction to grant Certiorari herein.

ARGUMENT

A. Jurisdiction Does Not Exist to Grant a Writ of Certiorari in this Cause.

The Petition filed by Militana in this cause fails to contain a statement, as is required by Rule 23(1)(b)(iii) of the Rules of this Court, of the statutory basis believed by him to confer jurisdiction on this Court to review by Writ of Certiorari the judgment in question. However, since the Writ, if granted, would be directed to a state court, the only possible basis of jurisdiction is 28 *U.S.C.* §1257(3).

Under this statute, in order for this Court to have jurisdiction:

(1) The final judgment sought to be reviewed must have been rendered by the highest state court in which a decision could have been had. *Beilan v. Board of Public Ed., School Dist. of Phila., Pa.*, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414, *reh. den.*, 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 91 (1957)

(2) The Question Presented must have been properly raised and preserved according to state procedures. *Dill v. Ebey*, 229 U.S. 199, 33 S.Ct. 620, 57 L.Ed. 1148 (1913);

(3) The Question Presented must raise a "federal question." *Durley v. Mayo*, 351 U.S.

277, 76 S.Ct. 806, 100 L.Ed. 1178, *reh. den.*, 352 U.S. 859, 77 S.Ct. 22, 1 L.Ed. 2d 69 (1956); and

(4) The final judgment sought to be reviewed must not rest on independent and adequate state grounds. *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837 (1963).

Respondent submits that none of these four requirements have been satisfied in the instant case.

(1) ***The Final Judgment Sought to be Reviewed was not Rendered by the Highest State Court in Which a Decision Could Have Been Had.***

Militana's Petition is based upon an alleged denial of a hearing in violation of the Fourteenth Amendment. (P. 4, 5) His Petition prays that a Writ of Certiorari be granted to the Florida Third District Court of Appeal, which was the highest state court which heard this cause. (P. 1)

However, since Militana was purportedly alleging a violation of his federal constitutional rights, and since this allegation was made, if at all, in the Appellate Court only, he had a right pursuant to Rule 2.1(5) (b) of the Rules of the Supreme Court of Florida[2] to appeal the Decision of the Third District Court of Appeal to the Florida Supreme Court.

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[2]This Rule provides in part:
"Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution."

The Florida Supreme Court is the highest state court in which a decision could have been had and, accordingly, this Court does not have jurisdiction under 28 *U.S.C.* §1257(3) to issue a Writ of Certiorari in connection with this cause to any court other than the Florida Supreme Court. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954); *Stratton v. Stratton*, 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed. 142 (1915).

(2) *The Question Presented was not Properly Raised and Preserved According to State Procedures.*

(a) *The question was not raised at trial.*

In *Louisville and Nashville R.R. Co. v. Woodford*, 234 U.S. 46, 34 S.Ct. 739, 58 L.Ed. 1202 (1914), this Court held that where state procedure requires that a right be initially raised before the trial court in order to be reviewable on appeal, this Court does not have jurisdiction to consider by Writ of Certiorari an alleged violation of a federal right which was not so raised. *Accord*, *Frank v. Volkommer*, 205 U.S. 521, 27 S.Ct. 596, 51 L.Ed. (1907); *Spies v. Illinois*, 123 U.S. 131, 8 S.Ct. 21, 31 L.Ed. 80 (1887).

The Law of Florida is clear that an appellate court cannot consider questions which were not properly raised and determined in the trial court. *Radiation, Inc. v. Campbell*, 200 So.2d 192 (Fla.App. 1967); *Jackson v. Whitmore Construction Co.*, 202 So.2d 861 (Fla.App. 1967); State ex rel *Libby v. Coleman*, 5 So.2d 60, 62 (Fla. 1941). This Court has itself recognized this rule. *Mutual L. Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375,

47 L.Ed. 480 (1902); *Mountain View Min. and Mill Co. v. McFadden*, 180 U.S. 533, 21 S.Ct. 488, 45 L.Ed. 656 (1900).

Since no evidence was introduced before the trial court indicating that Militana ever formally requested and was denied an administrative hearing prior to his dismissal for academic failure after his fourth year of study, the question was not properly raised under state procedures and this Court cannot properly review the question.

The trial court found that Militana had failed to produce any evidence that the University acted in bad faith in its action in dropping him (A. 127a) and that Militana's dismissal was based entirely on his academic deficiency. (A. 128a) The Court then gratuitously added that since Militana's dismissal was based on academic deficiency, he was not entitled to notice of charges and an opportunity to be heard. (A. 126a) Petitioner now seeks to use this gratuity as a basis for his claim that he properly raised at trial the question of his right to a hearing. (P. 4)

However, under Rule 23(f) Petitioner is required to state, with specific reference to particular portions of the Record, the precise manner in which the federal question presented was raised in the trial court. This Militana did not do and, due to the total lack of such evidence in the trial court record, cannot do.

In the absence of a showing that Petitioner raised the question at trial in accordance with state procedure, the question cannot properly be reviewed by this Court. *Wolfe*

v. State of N.C., 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed. 2d 1650, *reh. den.*, 364 U.S. 856, 81 S.Ct. 29, 5 L.Ed. 2d 80 (1960).

(b) *The question was not raised on appeal.*

Faced with the trial court's factual determinations that the University did not act in bad faith in dropping him (A. 127a) and that his dismissal was based solely on academic deficiency (A. 128a), on appeal Militana raised for the first time the question of his right to a hearing prior to dismissal. (A. 138a, 139a)

However, the point raised by Militana on appeal was not that he was entitled to a hearing even if his dismissal was for academic deficiency. Rather, his Point on Appeal accepted the fact that if his dismissal was for academic deficiency he was not entitled to a hearing, and asserted that the trial court's error was in its factual determination that the dismissal was based on academic, as opposed to non-academic grounds. (A. 139a)

In fact, throughout his argument on the point, Militana consistently urged that the University's classification of his dismissal as academic was a deliberate attempt to avoid the well-established rule that there is no right to a hearing for academic dismissal.[1] (A. 141a, 142a)

Nowhere in his argument to the appellate court does Militana ever even suggest that he would be entitled to a hearing if his dismissal was for academic failure.

[1]For example, Militana argued, "Likewise a more prompt disposition of Appellant could be obtained by Appellee's 'academic failure' theory since no hearing would be required." (A. 143a)

(A. 138a-149a) This question is presented for the first time in his Petition for Writ of Certiorari (P. 2), and this fact clearly prevents this Court from properly considering the question. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969); *Worthy v. Moore County*, 76 U.S. 611, 9 Wall. 611, 19 L.Ed. 565 (1870).

(3) *The Question Presented does not Raise a Federal Question.*

Militana claims that his Petition presents a "federal question" because he was denied an administrative hearing in violation of his rights under the Fourteenth Amendment. (P. 4, 5)

However, this Court has consistently recognized the fact that the proscriptions of the Fourteenth Amendment apply only to "state action." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955); *Hodges v. U.S.*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906); *Virginia v. Rives*, 100 U.S. 313, 10 Otto 313, 25 L.Ed. 667 (1880).

Neither the allegations of Petitioner's Complaint (R. 1-3), the evidence introduced at trial concerning his dismissal following his fourth year of study, nor the questions he raised on appeal (A. 138a, 139a) contain any evidence or allegations that the University's dismissal of Militana constituted "state action."

In the absence of any evidence in the Record before the Court that Militana properly raised the question of "state action" before the trial court and presented this question on appeal, this Court cannot properly consider the

question.[4] *Mutual L. Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480 (1902).

(4) *The Decision of the State Court from Which Relief is Sought Rests on an Independent and Adequate State Ground.*

This Court has consistently held that it will not review state court judgments which rest on independent and adequate state grounds, notwithstanding the presence of federal grounds. *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

The Court has also refused to accept jurisdiction in those cases where the record was ambiguous as to whether the state court's decision rested on an adequate independent state ground as well as on federal question.[5] *Lynch v.*

[4]The question of whether certain connections between specific universities and federal and or state governments, such as the receipt of federal and state funds, are sufficient to justify deeming certain acts of "private" universities "state action" has been the subject of much recent litigation. *See, Torres v. Puerto Rico Junior College*, 298 F.Supp. 458 (D. Puerto Rico 1969); *Grossner v. Trustees of Columbia University in City of New York*, 287 F.Supp. 535 (S.D.N.Y. 1968). In each of these cases the written opinions of the courts involved indicate that the trial court received substantial evidence concerning the relationship between the institution involved and the state and/or federal government.

[5]However, in some cases where justice seemed to require it, the Court has remanded the case to the state court for a clarification of the basis of its holding. *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920 (1940); *Patterson v. Alabama*, 294 U.S. 600 S.Ct. 575, 79 L.Ed. 1082 (1935).

New York, 293 U.S. 52 S.Ct. 16, 79 L.Ed. 191 (1934); *Adams v. Russell*, 229 U.S. 353, 33 S.Ct. 846, 57 L.Ed. 1224 (1913).

The decision of the state court from which Militana is seeking relief states in part that the denial by the Supreme Court of Florida of Militana's Petition for Writ of Certiorari in the first case concerning his dismissal after his third year of study, "leaves the University free to terminate appellee's student status in the Medical School" because of his third year failure. (A. 128a) In view of this independent state ground, this Court should refuse to take jurisdiction in this cause. *McCoy v. Shaw*, 277 U.S. 302, 48 S.Ct. 519, 72 L.Ed. 891 (1928); *Petrie v. Nampa and M. Irrig. Dist.*, 248 U.S. 154, 39 S.Ct. 25, 63 L.Ed. 178 (1918); *Eustis v. Bolles*, 150 U.S. 361, 14 S.Ct. 131, 37 L.Ed. 1111 (1893).

Prior to his dismissal after his third year of study, Militana was given a full and complete administrative hearing for which he was allowed to select the Chairman. At the hearing he orally presented his position and submitted to the panel a twenty-nine page memorandum in support of his position. (R. 1061, 1062) Thus, Militana's question presented in his Petition, even if decided in his favor, would have no affect upon his ultimate dismissal since independent of the action taken with respect to his fourth year of study, he failed his third year and was afforded a full and complete administrative hearing thereafter. That is, assuming arguendo that this Court now should impose a hearing requirement for academic dismissal, such a requirement was fully met subsequent to this third year dismissal which is, of course, an independent and separate basis for refusal to award the degree.

Under the circumstances, any ruling issued by this Court pertaining to the Question Presented would be an advisory opinion. It is the Court's desire to avoid giving such advisory opinions that is the basis of its refusal to consider cases which rest on independent and adequate state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

B. This Court, as an Exercise of Sound Judicial Discretion, Should Deny the Petition for Writ of Certiorari.

Even if the Court finds that jurisdiction exists to consider the matters raised by Petitioner Militana, the Court should, in the exercise of its discretion, deny the Petition for Writ of Certiorari.

Respondent submits that the nature of a dismissal based on academic failure, as opposed to misconduct, is such that a student should not be entitled to a hearing before being dismissed for academic failure. The lower federal and state courts which have decided this issue have uniformly held that a student dismissed for academic failure is not entitled to a hearing. *Zanders v. La. State Board of Education*, 281 F. Supp. 747 (W.D. La. 1968); *Due v. Florida A & M University*, 233 F. Supp. 396 (N.D. Fla. 1963); *Mustell v. Rose*, 282 Ala. 358, 211 So.2d 489, *cert. den.* 393 U.S. 936 (1968).

While the decisions of these lower courts are not controlling in this Court, Respondent believes that the sound reasoning upon which these decisions are based, and the fact that every court faced with this issue has reached the same decision, should be persuasive upon this Court.

Rogers. v. Missouri P.R. Co., 352 U.S. 500, 77 S.Ct. 443, 1 L. Ed. 2d 493 (1957); *Hamilton-Brown Shoe Co. v. Wolfe Bros. and Co.*, 240 U.S. 251, 36 S.Ct. 269, 60 L. Ed. 629 (1916).

The basis of these decisions is that courts are not qualified to intervene into the scholastic affairs of educational institutions, and therefore such intervention should be limited to those cases wherein the action of the school or university is arbitrary, capricious, or in bad faith. *Mustell v. Rose*, 282 Ala. 358, 211 So.2d 487, *cert. den.* 393 U.S. 936 (1968). And, as noted by one Federal District Court in an opinion based upon facts which are strikingly similar to those involved herein, "[t]he rule of judicial non-intervention into scholastic affairs is particularly applicable in the case of a medical school." *Connelly v. University of Vermont and State Agr. Col.*, 244 F. Supp. 156, 160 (D. Vt. 1965).

In determining whether a student should be entitled to a hearing before being dismissed for academic failure, the benefit to be derived by the student from the hearing must be weighed against the burden such a requirement would place upon educational institutions.

The number of students who are annually dismissed from educational institutions for academic failure is so great that the burden which would be placed upon such institutions if they were required to provide hearings for these students would be tremendous. Since the most appropriate, and perhaps the only qualified, persons to sit on the hearing panels would be the student's teachers, it would not be unreasonable to expect that such hearings could consume a significant portion of a professor's time

and would, therefore, have a serious effect upon an educational system which is already suffering from an inadequate supply of trained teachers.

On the other hand, a student would gain little or no benefit from being afforded the right to such a hearing. A review of the Record in the instant case amply illustrates this point.

During his third year of study, Militana undertook five prescribed credit subjects and in two out of five received "D's." (Pl. Ex. 9) At the conclusion of the third year, Militana had a cumulative grade point average of 1.92 (R. I. Ex. U) and in overall academic standing ranked 63 in a class of 65. (R. I. Ex. W)

The "D" grades he received that year were in obstetrics-gynecology clerkship and pediatrics. (Pl. Ex. 9) Based upon this poor performance in obstetrics-gynecology, his instructor, Dr. Joseph Decenzo, and the Chairman of that department, Dr. Ferguson, recommended to the Promotions Committee that Militana be given additional summer work in that area. (R. 1020) The doctors felt that such work would give Militana an opportunity to raise his competency to an acceptable level. (R. 1020)

The Executive Committee approved this recommendation at a meeting on June 12, 1963 (R. I. Ex. Y) and directed that Militana take additional satisfactory summer work and re-examination in obstetrics-gynecology as well as pediatrics.[6]

[6]At the conclusion of the third year of Medical School, there were ten students who made a "D" in one or more subjects. (R. I. Ex. U) One of these students was dismissed; each of the other nine members of the class, including Militana, was required by the Promotions Committee to take additional satisfactory work. (R. I. Ex. Y)

When informed of the decision of the Promotions Committee, Militana made no complaint as to any impropriety of the Committee's action, but rather stated that he was very grateful for the opportunity and that he would certainly do better by studying and reading, and taking more of an interest. He further assured Dr. Decenzo that he would not be disappointed in his work. (R. 1022)

Dr. Decenzo, who supervised this summer work, instructed the other attending physicians that Militana was to be given every opportunity to demonstrate his ability and they were to avail themselves of every opportunity to help him. (R. 1022)

At the conclusion of the clerkship,[7] Militana was offered the choice of a written or oral examination — he chose the former. (R. 1028) The examination was in three parts; each part prepared by a different instructor. (R. 1024) Prior to administering the examination, Dr. Decenzo reviewed it thoroughly and satisfied himself that it was fair, without repetition and concerned with material that the student had covered. (R. 1927) During the examination, he frequently looked in on Militana and offered to explain any questions which he did not understand (R. 1029) and at the conclusion of the examination, Militana thanked Dr. Decenzo and told him he thought it was a very fair examination. (R. 1029)

In an effort to be scrupulously fair in the grading of the examination, the following procedure was utilized. Dr. Decenzo graded each of the three parts and recorded a separate grade for each part. The physicians who pre-

[7]His work in the clinic portion that summer was considered to be of acceptable quality. (R. 1023)

pared the other two parts of the examination graded each part independently without knowledge of the other grades assigned, and recorded a separate grade for each part. (R. 1029) Finally, all three examination papers were given to the Department Chairman, Dr. Ferguson, who graded the whole examination. None of the grades came out passing.[8] (R. 1030)

Thus, following Militana's summer work, the Executive Committee, in compliance with prescribed rules and regulations and policies for promotions, dismissed him for academic failure. (R. I. Exs. Y, U)

Throughout his fourth year as a medical student, Militana's performance was carefully observed. In fact, the failing grade in Senior Year Medicine which Militana received, and which was one of the primary bases for his dismissal following his fourth year of study (Def. Ex. R) was determined primarily on the basis of Militana's performance in a clinic where he had daily close contact with, and supervision by, his professors. (R. 585, 586, 1080)

Specifically, the Senior Year Medicine course consisted of a student's participation in a clinic wherein he examined actual patients in the outpatient section of a hospital, made differential diagnoses of the pathological processes he would want to rule out by subsequent laboratory examinations[9] and decided the course of therapy which he would employ on the patient. (R. 585, 1080)

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[8]Militana's answers to the questions on this examination were described by Dr. Decenzo, who is a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetricians and Gynecologists (Def. Ex. Z) as not only wrong but bizarre. (R. I. 59A)

[9]"Differential diagnoses" are statements of the patient's possible illnesses, in order of the probability of their presence. On the basis of these diagnoses, tests are conducted to determine the particular illness with which the patient is afflicted. (R. 982, 983)

After the student examined the patient and drew his conclusions therefrom, he immediately met with his professor, out of the hearing of the patient, and discussed his findings and conclusions. (R. 586, 1080)

The professor and the student then returned to the patient and the professor verified the student's findings. (R. 586, 1081) The professor and the student then left the patient again and discussed the final diagnosis and therapy upon which the patient would be treated. (R. 586, 1081)

During his participation in Senior Year Medicine, Militana engaged in the above procedure with three different professors (R. 592) and each of these professors independently evaluated Militana's performance. (R. 936, 976) This evaluation was done immediately following each instance when Militana examined a patient, rendered a diagnosis, and conferred with a professor. (R. 1083) At the end of the semester these professors met and discussed their evaluations, and finally arrived at a recommended grade for the course. (R. 976) Testimony in the Record clearly established that this means of grading, based on daily observation of the student, was a far superior means of arriving at a grade in a course of that nature than the use of oral or written examinations. (R. 966)

Moreover, Militana had ample opportunities to discuss his status with, and obtain help and counseling from, his professors (R. 1022) as well as Medical School administrators. (R. 923-925)

To impose upon this system the additional responsibility of affording a student a hearing at which he can attempt to convince his professors that their evaluations of him, some of which may be based on observations of his

performance made many months before the hearing, are incorrect, would be of little benefit to the student.

A teacher's evaluation of a student's performance, if made in good faith and not arbitrarily, should not be subject to attack by the student. If the professor acted in bad faith or arbitrarily, the student has recourse in the courts. *Mustell v. Rose*, 282 Ala. 358, 211 So.2d 487, *cert. den.* 393 U.S. 936 (1968).

C. Militana's Petition Should Be Denied for Failure to Comply With Rule 21.

Rule 21 requires a Petitioner to file with his Petition a certified copy of the entire record in the court to which certiorari would be directed, unless the parties stipulate to the omission of portions of the record. The parties hereto have not so stipulated.

Militana's Petition contains only a copy of a denial of a Petition for Rehearing in the Florida Third District Court of Appeal and a copy of the opinion of that Court as it appears at 236 So.2d 162.

As a result of Petitioner's failure to comply with Rule 21, this Court has no record upon which it can base any of the findings it must necessarily make in order to assume certiorari jurisdiction (*i.e.* that the Question Presented was properly raised and preserved below, that the Question Presented involves a federal question, that the opinion of the appellate court does not rest on adequate state grounds, and that the Writ of Certiorari, if granted, would be directed to the highest state court in which a decision could haye been had). In the absence of an adequate record upon which to base such necessary findings, the Court should decline to take jurisdiction of this cause.

CONCLUSION

Respondent respectfully submits that this Court does not have jurisdiction to grant the Writ prayed for herein because,

1) the court to which the Writ is sought to be directed is not the highest state court in which a decision could have been had,

2) the question of Petitioner's right to a hearing was not properly raised in the trial court, or on appeal,

3) the Question Presented does not raise a federal question since the University's dismissal of Militana was not "state action," and

4) the final judgment sought to be reviewed rests on independent and adequate state grounds.

Respondent further submits that since the trial court specifically found that the University did not act in bad faith in dismissing Militana, and since the burden which would be imposed on educational institutions if they were required to provide hearings for students dismissed for scholastic failure would be far greater than any benefit which would be gained by the student from such a hearing, this Court should refuse to intervene in this matter.

Respondent also submits that Petitioner's failure to append a certified copy of the complete record in the ap-

pellate court below makes it impossible for this Court to determine if it has jurisdiction to grant Certiorari herein.

Based upon the legal arguments and precedents cited herein, Respondent respectfully requests this Court to deny Militana's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to opposing counsel of record this ____ day of February, 1971.

Aubrey V. Kendall